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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 772 68

MILLER BROTHERS COMPANY

Petitioner

against

LEKTOPHONE CORPORATION

Respondent

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof

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OCTOBER TERM, 1929.

MILLER BROTHERS COMPANY, *Petitioner,*

against

LEKTOPHONE CORPORATION, *Respondent.*

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Miller Brothers Company, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review a judgment entered by the United States District Court for the District of Delaware entered February 12, 1930, from which judgment appeal has been taken to the Circuit Court of Appeals for the Third Circuit. A transcript of the record in the case as it exists in the Court of Appeals for the Third Circuit is furnished herewith in accordance with Rule 35 of the rules of this Court.

Summary and Short Statement of the Matter Involved.

Respondent, Lektophone Corporation, is the owner of Hopkins Patent No. 1,271,529 involved in the litigation.

The Hopkins patent has been held by the Circuit Court of Appeals for the Second and Ninth Circuits, and the United States District Court for the Southern District of Ohio, Western Division, to be of very limited scope, if valid, and, by direct implication, to be invalid:

> *Lektophone Corporation* v. *The Rola Company*, 34 Fed. 2nd, 764, C. C. A. 9th, WILBUR, C. J.;
> *Lektophone Corporation* v. *Western Electric Co.*, 16 Fed. 2nd, 10, C. C. A. 2nd, MANTON, C. J.;
> *Lektophone Corporation* v. *Sylo Lighting Fixture Co.*, 16 Fed. 2nd, 7, C. C. A. 2nd, MANTON, C. J.;
> *Lektophone Corporation* v. *Crosley Radio Corporation*, unreported, U. S. D. C., O. (W. D.), HICKENLOOPER, D. J.

The Circuit Court of Appeals for the Third Circuit has held the patent to be valid and entitled to a broader scope:

> *The Lektophone Corporation* v. *Brandes Products Corporation*, 20 Fed. 2nd, 155 C. C. A. 3rd, BUFFINGTON, C. J.

This Court on January 27, 1930, granted a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in the case of *Lektophone Corporation* v. *The Rola Company* (*supra*), apparently because of the divergency of opinion between the Second, Sixth and Ninth Circuit Courts, and the Third Circuit Court of Appeals.

The issues in the present case are substantially identical with the issues in the Ninth Circuit case. The District Court in Delaware rendered its decision after the decision was rendered by the Court of Appeals in the Ninth Circuit, and disposed of the case on the assertion that the District Court felt itself to be bound by the decision of its Circuit Court of Appeals, without passing on the merits of the controversy. Appeal was promptly lodged in the Court of Appeals for the Third Circuit whereupon this petition was filed so as to enable the present case to be heard by this Court at the same time that the *Rola* case from the Ninth Circuit is presented.

Reasons Relied Upon for the Granting of Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds as set forth in Rule 35 of the rules of this Court:

1. There is a direct conflict between the decision of the Court of Appeals for the Third Circuit, relied upon by the District Court in the case at bar (20 Fed. 2nd, 155), and the Court of Appeals for the Ninth Circuit (34 Fed. 2nd. 764) and Second Circuit (16 Fed. 2nd, 10, and 16 Fed. 2nd, 7).

2. This Court has granted a writ of certiorari in the Ninth Circuit case and justice will be expedited by bringing this case from the Third Circuit for hearing simultaneously with the Ninth Circuit case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals

for the Third Judicial Circuit sitting at Philadelphia, Pennsylvania, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings had in this cause to the end that this cause may be reviewed and determined by this Court; that the Circuit Court of Appeals for the Third Circuit be directed to reverse the judgment of the District Court of the District of Delaware and that the petitioner be granted such other and further relief as may seem proper.

SAMUEL E. DARBY, JR.,
Attorney for Petitioner.

Dated, New York, New York, March 26th, 1930.

State of New York, }
County of New York, } ss.:

SAMUEL E. DARBY, JR., being duly sworn, deposes and says: that he is the attorney for the petitioner herein; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

SAMUEL E. DARBY, JR.

Subscribed and sworn to before me
this 26th day of March, 1930.

ROSE A. BATTERMAN,
Notary Public.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

The opinions of the Court of Appeals for the Second Circuit are reported at 16 Fed. (2nd) 10, and 16 Fed. (2nd) 7.

The opinion of the Court of Appeals for the Third Circuit is reported at 20 Fed. (2nd) 155.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 34 Fed. (2nd) 764.

The opinion of the District Court for the District of Delaware in the case at bar is unreported but is found beginning at page 13 of the Record.

Jurisdiction.

The grounds of jurisdiction are:

1. The date of the judgment to be reviewed was February 12, 1930.

2. The judgment was rendered in a suit in equity brought under the Patent Statutes to determine the issues of validity and infringement of Letters Patent of invention.

3. The statute under which the jurisdiction is invoked is Section 240 (a) of the Judicial Code, 28 U. S. C., No. 347 as amended by the Act of February 13, 1925.

4. Cases believed to sustain the jurisdiction are:

I. T. S. Co. v. *Essex*, 272 U. S. 429;
Alexander Millburn Co. v. *Davis-Bournonville Co.*, 270 U. S. 390;
Concrete Appliance Co. v. *Gomery*, 269 U. S. 177.

Statement.

The facts are sufficiently stated in the petition.

Statute.

The section of the Statute involved for consideration on this appeal is 4897 R. S., as follows:

> "Any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within one year after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent."

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is allowed, are that the District Court in the District of Delaware erred:

1. in granting an injunction.
2. in decreeing the Hopkins patent to be valid.
3. in decreeing the claims of the Hopkins patent to be infringed.

4. in refusing to dismiss the bill.

5. in failing to hold that the Hopkins patent is invalid under Section 4897, R. S.

Argument.

Obviously, litigation will be minimized and justice expedited if the present controversy is heard and disposed of at the same time as is the Ninth Circuit case which involves the same patent, substantially the same structure alleged to infringe, and the identical issues of validity and infringement.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Attorney for Petitioner.